

MONTANA PUBLIC DEFENDER COMMISSION

Minutes

Office of the State Public Defender, Central Office
44 W. Park
Butte, Montana

February 29, 2008

(Approved at the April 18, 2008 Commission Meeting)

Call to Order

The Montana Public Defender Commission meeting was called to order by Chairman Jim Taylor at 8:45 a.m.

Commissioners Present

Dan Donovan, Great Falls; Jennifer Hensley, Butte; Stephen Nardi, Kalispell; Caroline Fleming, Miles City; Vic Miller, Harlem; Tara Veazey, Helena; Wendy Holton, Helena; and James Park Taylor, Missoula.

Commissioners Absent

Mike Sherwood, Missoula

Interested Persons

Brent Doig, Office of Budget and Program Planning; Colleen Ambrose, Department of Corrections; Frank McGee, contract public defender in Butte; Koan Mercer, public defender, Office of the Appellate Defender

Chairman Taylor announced that he will no longer chair the Commission following the completion of his current term. He plans to be in China for several months beginning next fall. Chairman Taylor is in conversation with the Governor's office regarding his possible reappointment for another term. Current terms are also expiring July 1 for Commissioners Donovan, Fleming and Hensley. Chairman Taylor expects to hear about the two positions that are currently vacant soon.

Approval of Minutes from the November 9, 2007 Meeting

Commissioner Nardi moved to adopt the minutes as submitted. Commissioner Veazey seconded the motion. The motion carried.

Reports

Chief Public Defender Report

- *Public Defender Program Update*

Chief Public Defender Randi Hood informed the Commission of changes in the regional deputy public defender (RDPD) positions. In Region 10, Ali Moulton returned to private practice and is doing a significant amount of contract work for OPD. Matt Wald has assumed management of both Regions 10 and 11. The Region 10 office remains in existence, staffed by a full time attorney and a full time support person. Conflicts are not an issue since most of the work in Regions 10 and 11 is contracted out. It remains challenging to find attorneys willing to work in eastern Montana, even with the

possibility of negotiating a higher salary. Chief Hood will be recruiting at the University of Montana Law School job fair. It was suggested that it might be worthwhile to recruit at the law school in Bismarck or even on the east coast.

Jeremy Gersovitz is now the felony attorney in Helena. His expertise is sorely needed due to the large number of inexperienced attorneys there. Kristina Neal will manage Region 4 on a part-time basis, and Matt McKittrick has assumed the RDPD duties in Region 3. The Boulder attorney retired and that office will be closed shortly. Chief Hood hired a rover based out of the Central Office to work cases in Regions 4 and 5 that were previously handled from the Boulder office. There are currently public defender positions open in Havre, Great Falls, and two in Billings ([exhibit 1](#)).

Dan Kohm and Mori Woods are the new Criminal Investigator Supervisors. They have proposed some organizational changes following their initial tour of the state. Both are top notch investigators and they will assist with major cases (including the death penalty case in Billings) as well as provide day to day supervision for the investigators.

Chief Hood is addressing a discovery issue in Helena. The county attorney wants to charge 25 cents per page to provide the defense with discovery. There is a motion pending before Judge Sherlock, and Chief Hood is working closely with Chief Appellate Defender Jim Wheelis to determine what the next steps might be depending on the results of Judge Sherlock's decision.

Chief Hood explained the Governor's 20 x 10 Energy Initiative ([exhibit 2](#)). The state is also involved in an effort to reduce fuel consumption, and OPD has adopted a Fuel Conservation Strategy. There is a concerted effort to combine meetings when travel is involved.

- *Report to Governor/Legislature/Supreme Court*
A proposed format for the caseload data to be submitted as an addendum to the *Report* will be discussed later on the agenda under "Caseload/Workload Discussion."
- *Union Issues*
Current labor issues include work on an addendum to the attorney contract for a career pay ladder and associated pay scale, subject to the availability of funding. The hope is to provide incentives for employees to stay. Work on the initial agreement with the support staff and investigator bargaining units are also underway. A Labor Management Committee will be formed for each of the new units, support staff and investigators.

Commissioner Miller, a member of the Collective Bargaining Committee, said that these are the least contentious labor negotiations he has ever been involved in, and he is fascinated by management's advocacy on behalf of the attorneys.

- *Financial Update*
Administrative Director Harry Freebourn presented the final unaudited Financial Statement for Fiscal Year 2007 ([exhibit 3](#)) and the Fiscal Year 2008 Year-to-Date Financial Statement (through January 31) ([exhibit 4](#)) and explained each of the documents in detail. Both years are currently the subject of a legislative audit, led by

Jennifer Erdahl. Audit teams have been in the Central Office and will begin visiting the regional and appellate offices April 1.

Any potential savings in operating costs in FY 08 are expected to be offset by the cost of contract services. However, the “45 day rule” is helping to predict contract attorney costs and so far no payments have been refused. Costs for mental health evaluations have leveled off this year due in part to implementation of the mental health protocol and the fee schedule. Investigator fees are down when compared to last year due to increased staffing and active management of contract investigation services. The run rates look like the year will end right on budget, although it will be tight. Mr. Freebourn informed legislative staff that OPD does not expect supplemental funding for FY 08. The budget is being monitored very closely, and some expenditures may be delayed until next fiscal year.

Mr. Freebourn believes that the Appellate program may be over budget due to the cost of contract services. Although the Appellate office rigorously monitors their budget, it is difficult to control the cost of transcripts. Two staff vacancies were recently filled, reducing the number of cases that need to be contracted out, and Chief Hood is optimistic that the contract costs will stabilize.

Chief Hood discussed the need for approximately eight “modified FTEs,” with the greatest need in the Appellate office and in Region 1. Chief Hood began a discussion on the 2011 biennium budget by explaining the forecast for the long term need of 22.75 additional FTE, including opening an office in Hardin and possibly in Libby. Most locations will have to work with their existing space since there are leases in place.

The discussion returned to the financial presentation, and Commissioner Veazey requested that the percentage of population numbers be restored to the financial reports. She also noted that the numbers for Missoula look high and Billings looks low. Chief Hood responded that it is difficult to keep the Billings office fully staffed, resulting in high contractor costs. Mr. Freebourn said that the rents in Missoula are also significantly higher than in Billings.

Commissioner Veazey asked how the Appellate office decides which cases they accept. Chief Wheelis and Chief Hood explained that under the new system, the appeal process is totally client driven. The Appellate office must file a brief for every client that requests an appeal, even if the grounds for the appeal seem to be frivolous. There has been a huge increase in the number of appeals filed, because it costs the client nothing and the Appellate office must respond to them all, not just the ones with strong merit. Chief Wheelis would like to see some attorney training on how to discuss with clients whether or not an appeal is appropriate. This would be a way to reduce the workload and associated costs while ensuring that everyone who has a legitimate basis for appeal has representation.

- *2011 Biennium Budget Discussion*

Mr. Freebourn presented the FY 2010-2011 Draft Budget Items ([exhibit 5](#)) and discussed each item in detail. To meet the Governor’s office submission deadline, the Commission must approve the OPD budget request at their April meeting. Brent Doig, Office of

Budget and Program Planning, said that there will be one-time-only funds available during this budget cycle, and suggested that OPD consider needs such as file management equipment that could be funded this way. Chairman Taylor asked about issuing an RFP for case management software using one-time funds in the next biennium. Mr. Freebourn said that, if needed, this request may be included in the IT bill next session, which is a separate process.

Once the Commission has submitted the budget request to the Governor's budget office, there will be discussions about budget items. Items can be approved, denied, and/or adjusted by the Governor's budget office. If the Governor's budget is issued, and it does not include the requested increase to the contract attorney rate (submitted as a separate restricted item), the only recourse would be for the contract attorneys to form their own coalition to request the rate increase directly to the legislature. Final numbers will be presented to the Commission for approval at the next meeting.

- *IT Update*

Information Technology (IT) Manager Teri Heiland presented the IT Update ([exhibit 6](#)). People were very frustrated with the initial JustWare implementation. However, the vendor has been extremely responsive and, with the new release, errors are minimal and are no longer impacting the ability to work. Some retraining and marketing will be needed to get people back on board, and some of the other initiatives included in the scope of work have been on hold while the problems were being resolved. Chairman Taylor asked if there is any point in looking at another application for the next biennium. Ms. Heiland said that it would be difficult to get ITSD to support making a change. JustWare has a lot of potential, and should be able to integrate with the financial system without additional cost aside from training and IT resources. Chairman Taylor suggested requesting one-time funds for specific IT projects to avoid over-extending current resources.

The brief bank will initially be available only to internal staff. Ms. Heiland believes that eventually SharePoint will be available externally, but for now the contract attorneys will have to work with the regional offices to access the brief bank. Commissioner Veazey suggested that Ms. Heiland investigate mtprobono.net as a brief bank solution, and she will provide contact information.

The video conferencing equipment has been installed, but without the expected wireless internet access. For security reasons, the court system requires that Vision Net limit the data so that the T1 goes just to the Polycom unit. Ms. Heiland has requested an exception for the Central Office conference room from ITSD. The other possibility is a public access wireless site, but that might prove to be cost-prohibitive.

Public Comment

Koan Mercer, Assistant Appellate Defender, said that it strikes him as odd that OPD is under the budget of the Governor, the chief law enforcement officer, and he wondered if it should be separated somehow. Mr. Mercer also said that OPD should advocate for all kinds of improvements in the criminal justice system. He suggested that broadcasting the Commission meetings via video conference would improve morale in the field. There is a disconnect with the line attorneys, both FTE and contract, who aren't used to working in

a bureaucracy and don't understand the extent to which Chief Hood and the Commission are supporting them in the legislature. It was suggested that the Commission write to all public defenders explaining their position and asking the line attorneys for advocacy assistance during the next session. It was also noted that individual contact with local legislators is extremely important.

Reports (continued)

- *Legislative Items—Bills and Meetings*

The 2009 regular legislative session will convene on January 5, 2009. There are two ways for the Commission to introduce legislation. A highly successful method is through the Law and Justice Interim Committee. They will be soliciting requests from agencies who want the Committee to sponsor legislation during their June and August meetings, and they will find a bill sponsor for any legislation they are supporting. The second way has a timeframe up until November, but the agency must find their own bill sponsor, which can be challenging since the legislators aren't all known until after the November election. The Commission intends to introduce the recording interrogation bill again next session. Chief Hood will investigate whether new legislation is needed to require verification of income and expenses as part of the indigency standard.

The Commission discussed restrictions on OPD staff testimony regarding criminal justice legislation and how that affects the agency's ability to function independently as required under the ABA principles. Mr. Freebourn will find out if there are statutory limitations on employee testimony and will report to the Commission at the next meeting. In any case, all state employees are allowed to testify as private citizens on their own time.

Commissioner Veazey will draft an invitation to all public defenders, on behalf of the Commission, asking for their participation and support during the session. The Commission hopes for better communication with the line attorneys during the next session, and would like to have both FTE and contract public defenders as members of their legislative subcommittee. Commissioner Miller said that partnerships with local governments will also be important going into the session.

A performance report update for the agency will be presented at the June meeting of the Legislative Finance Committee. Budget requests are due in the Governor's office in May, with discussions continuing through September.

- *Caseload/Workload Discussion*

Mr. Mercer presented a method of controlling caseload by monitoring intake rather than open cases ([exhibit 7](#)). Chief Hood views it as a thing of beauty because it promotes working cases and is an excellent tool for allocating resources. It will help prevent attorney overload and assist in determining if there are adequate FTE in a given office. This method of case counting has been piloted in Missoula and Kalispell and the feedback has been very positive. The trial will begin in all regions in March, for a three-to six-month period.

Mr. Mercer explained the system in depth. It is an adaptation of the annual caseloads defined in the Standards to make them useable over time. Cases are weighted by type, and there are limits to how many new units an attorney can take on in a given month and

year. This allows local management to make decisions on case assignments based on the complexity of the case, as long as the maximum limits are not exceeded. This system is not the same as an open caseload limit; in fact there is no incentive to keep cases open under the system. Rather, it makes the annual numbers for an ethically acceptable caseload workable on a month to month basis.

Commissioner Hensley questioned the validity of data to be gathered on a “go-forward” basis and said that budget decisions made on this model would not be defensible. Chairman Miller agreed, but said that data will be generated while piloting the system.

- *Training Coordinator Update* ([exhibit 8](#))
Training Coordinator Eric Olson circulated a copy of the OPD Criminal Investigation Manual, developed in November ([exhibit 9](#)). He also circulated a memo regarding CLE credits for OPD training sessions that have been approved by the State Bar ([exhibit 10](#)). Mr. Olson has captured both satellite and live training sessions on video, and hopes to have them edited and ready for viewing by summer. He will continue to take advantage of opportunities to work collaboratively with the Montana Association of Criminal Defense Lawyers as well as the Federal Defenders of Montana.

Mr. Olson asked the Commission for assistance in responding to contract attorneys’ inquiries regarding the training standard. Chairman Taylor agreed to address this during the Standards discussion later on the agenda. Chairman Nardi said that the Standards give Mr. Olson the ability to broadly interpret the training requirements.

- *Mental Health Evaluation Protocol Update*
Mr. Olson reported that OPD Mental Health Consultant Dr. Laura Wendlandt continues to do a great job in implementing the Mental Health Protocol. It has provided clients with the help that they need and pays providers fairly. However, there is a risk of losing several very competent and valuable providers of sex offender evaluations due to the current rate. Mr. Olson asked the Commission to modify the rate schedule ([exhibit 11](#)) to increase the rate for sex offender evaluations from \$1,250 to \$1,500. The second suggested modification to the rate schedule allows the Chief Public Defender to pay outside of the rate structure under extraordinary circumstances. Mr. Olson said that somehow this was lost in the final draft of the protocol originally approved by the Commission. Chairman Taylor moved to adopt both modifications, increasing the rate for sex offender evaluations to \$1,500 and authorizing the Chief to pay outside of the rate structure. Commissioner Nardi seconded. Motion carried.

OPD will present a two-day Forensic Psychology conference in April with nationally known forensic psychologist Bernard Lewis.

Appellate Defender Program Report

Chief Wheelis reported that new cases are down slightly ([exhibit 12](#)). He is glad to have two new attorneys, Koan Mercer in the Missoula office, and Tammy Hinderman in the Helena office. Although there will always be a certain number of conflicts because of dependent/neglect cases, the number of conflict/contract cases is decreasing as the distance from the Attorney General’s office increases for Chief Wheelis and Assistant Appellate Defender Joslyn Hunt.

Chief Wheelis said that one of the biggest problems is figuring out what to with Anders briefs. What has changed is that clients know that they have a right to appeal, and it is hard to convince them that sometimes sentence review or post-conviction relief are more appropriate approaches. He also noted that virtually every case now has some sort of inappropriate probation condition.

General Discussion

- *Recording Jail Phone Calls*

Captain Dennis McCave, Montana Sheriffs and Peace Officers Association, and Fred Hansen Montana Association of Counties, joined the meeting by conference call. They recently sent out a risk alert regarding recording jail calls ([exhibit 13](#)). Colleen Ambrose, Montana Department of Corrections, explained how the prisons protect the privacy of inmate calls to their attorneys. The phone system contractor, PCS, blocks recording access for calls to phone numbers that have been verified as attorney numbers, including public defender offices. Contract attorneys must contact the prison to have their phone numbers included on the list. Although all calls go onto a hard drive, the Department of Corrections cannot access any calls to or from the numbers on the privileged list. Chairman Taylor asked for additional information about the data that is saved to disk and whether it might be subject to subpoena.

In the counties, most jail systems only process outgoing calls. Some won't allow calling cell phones or switchboards. Again, the attorney must request that their number be listed as privileged to prevent the call from being recorded. Captain McCave said that as far as he knows, these calls are not recorded anywhere. In Yellowstone County, a blocked number can be added to the list within the hour, but it may take a day or two in other locations. There isn't a uniform standard for all detention centers in how privileged calls are handled.

Chairman Taylor suggested that legislation might be required if recordings are actually in existence, whether or not the Department of Corrections has access to them. Ms. Ambrose offered to gather additional technical information regarding the recording process, and will report back to the Commission. She will also gather information on how recording is handled in the regional prisons. Chairman Taylor asked that Mr. Hansen assist in identifying the procedures in all 56 counties so that contract attorneys can be notified.

- *Improper Waivers in Plea Bargains*

Clients signing plea agreements in Missoula and Ravalli counties are being required to waive their right to claims of ineffective assistance of counsel, which is an illegal provision ([exhibit 14](#)). Chief Hood and Regional Deputy Public Defender Ed Sheehy will meet with Missoula County Attorney Fred Van Valkenburg and Ravalli County Attorney George Corn to try to resolve the issue. If they are unsuccessful, they may be forced to seek an ethics opinion or file a writ.

Reports (continued)

- *Contract Officer Update and Contractor Rate Discussion*

Contract Manager Larry Murphy encouraged the Commission to meet to review contractor rates as required in Administrative Rules of Montana 2.69.601. The Commission asked the staff to collect information relevant to recommending a new rate,

including the basis for the federal rate increase to \$100 and a survey of what other states pay. Any increase the Commission chooses to adopt for the contract attorney rate will be submitted as a separate budget request for the next biennium. It will be essential for contractors to lobby their local legislators to advocate for funding the increase.

Several suggestions for modifying the monthly stipend were discussed ([exhibit 15](#)). The stipend is still an irritant in the field, but opinions on an acceptable solution differ by region. Mr. Freebourn recommended making a change with the beginning of the new fiscal year. Chairman Taylor asked to look at the financial situation and revisit the issue at the April meeting.

Commissioner Donovan raised an issue about a contract attorney who has not yet submitted a claim for services this fiscal year despite signing a Memorandum of Understanding (MOU) agreeing to submit claims in a timely fashion. Commissioner Donovan wondered if the terms of the MOU can be enforced. Mr. Freeborn said that the revised MOU was reviewed by attorneys in the Department of Administration and on the Governor's staff, but there is no certainty until it is challenged by the contractor. The Commission suggested sending a letter to non-compliant contractors each month stating that claims for services provided prior to the 45 day limit will not be paid.

Mr. Murphy had 54 responses to the Lexis offer, and allocated the 50 available licenses based on the amount and type of work each contractor does for OPD. Under the terms of the agreement with Lexis, OPD will absorb the cost of the licenses. However, the cost will be partly offset by a reduction in the Accurint rate.

An additional claim has been received from the attorneys handling the clemency case. Since the clemency issue has been resolved, Chief Hood and Mr. Murphy don't think they can justify payment of the claim under the agency's mandate. The Commission concurred and the claim will be denied.

Mr. Murphy distributed a draft of the dispute resolution process ([exhibit 16](#)). The Commission asked that the process be clarified to state that the decision of the panel does not need to be unanimous but is by majority, and that the process relates only to fee disputes, not the type of work undertaken (as in the previous discussion).

Public Comment—General

Ms. Ambrose has been working with Chief Wheelis on sentence calculation. She reviews a lot of judgments that are very poorly drafted, and suggested that public defenders review them carefully for clarity. She will work with Mr. Olson to present a videoconference training on the "Top 10 Errors in Judgments."

Public Comment—Contract Attorney

Frank McGee, a contract attorney in Butte, made several comments. He said that the \$25 office stipend is too low, and he would prefer to be paid actual costs, which average \$150 per month. He said that training events should be free to contract attorneys because of the low hourly rate they are paid. Mr. McGee said that the mileage issue cuts both ways, and that sometimes carpooling to the prison with OPD staff costs him more time. He appreciated the Lexis offer, but isn't sure he needs it.

General Discussion (continued)

- *Self-Evaluation*

Commissioner Donovan suggested a voluntary evaluation process, including everyone from Commissioners to line attorneys, to review the system in relation to the ABA Ten Principles of a Public Defender Delivery System ([exhibit 17](#)). Although he thinks it is premature to start a formal evaluation process at this time, Chairman Taylor said that this might be another opportunity to use one time only funds during the next budget cycle. He will pursue contacts and investigate costs. Commission Veazey suggested the informal evaluation be conducted using the Survey Monkey tool, and Commissioner Fleming recommended that the survey be kept to no more than five pages.

- *Standards*

Commission Hensley suggested a mandatory one-hour review of the Standards at the annual conference each year, and asked to revisit training at the Montana Law Enforcement Academy. She also recommended that a small group including a Commission member, staff and a contract attorney, review the standards over the next 12 months.

Commissioner Veazey said that the Supreme Court's new privacy rules have created panic in the civil world of family law. She will send information to the Commission and to Chief Hood for review to see if it will impact criminal defense work.

Adjourn

The meeting adjourned at 4:15 p.m. The next meeting is scheduled for April 18, 2008 in Lewistown.

Exhibits 1 – 17 and [exhibit 18](#) (which was distributed but not discussed), have been posted with these minutes to the Office of the State Public Defender website at: <http://www.publicdefender.mt.gov/>.